

**STATE OF NEW JERSEY**

***Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102  
www.bpu.state.nj.us***

OFFICE OF CABLE TELEVISION

IN THE MATTER OF ALLEGED NON-COMPLIANCE )  
BY RCN OF NY, A WHOLLY-OWNED SUBSIDIARY )  
OF RCN CORPORATION, WITH THE )  
REQUIREMENTS OF N.J.S.A. 48:5A-15, 16, 17 AND )  
22 REQUIRING MUNICIPAL CONSENT FROM THE )  
CITY OF JERSEY CITY AND A CERTIFICATE OF )  
APPROVAL FROM THE BOARD FOR NEWPORT )  
COMMUNITY IN JERSEY CITY, NEW JERSEY )  
)

ORDER DENYING  
RCN'S MOTION FOR  
RECONSIDERATION

Docket No.: CC03010023

**(SEE ATTACHED SERVICE LIST)**

BY THE BOARD:

The New Jersey Board of Public Utilities ("Board"), Office of Cable Television, pursuant to N.J.S.A. 48:5A-1 et seq., has been granted general supervision and regulation of and jurisdiction and control over all cable television systems which operate within the State of New Jersey, subject only to the limitations of Federal law. Pursuant to this authority, the within matter was opened to the Board by receipt of information which the Board reviewed and on which the Board made final findings of fact and conclusions of law, set forth by an Order dated April 29, 2003. RCN of NY (RCN) has filed a Motion for Reconsideration, which is now before the Board.

In its April 23, 2003 Order, the Board noted that RCN is the sole provider of video service to the residents of the Newport building complex via a satellite master antenna television (SMATV) system, that the coaxial cables used to distribute that video system's signal cross under two roads which have been dedicated to the public use, and that while a "non-exclusive utility easement" may exist, RCN does not have an ownership interest in the easement. As such, the Board found that the RCN SMATV System satisfies the Federal definition of a cable system and is subject to Board authority. Based upon these findings, the Board directed RCN to simultaneously file for municipal consent from the City of Jersey City under N.J.S.A. 48:5A-22 and for a certificate of approval from the Board under N.J.S.A. 48:5A-17(a).

On May 20, 2003, RCN, through its attorney, filed a Motion for Reconsideration. RCN raises three specific points upon which it claims reconsideration is appropriate. First, RCN disputes the finding of the Board that RCN had "not provided any information to indicate that RCN is an

owner, successor, assign, designee or nominee under the easement declaration.” RCN also disputes the conclusion of law reached by the Board, and notes its belief that the Board should find the decision of the Court of Appeals for the Eighth Circuit in Guidry Cablevision/Simul Vision Cable System v. City of Ballwin, 117 F.3d 383 (8th Cir. 1997), more persuasive than the decision of the Iowa Supreme Court in Mason City v. City Center of Mason City, Inc., 634 N.W.2d 667 (Iowa 2001). Finally, RCN argues that it should not be required to obtain a cable television franchise while the Petition of Comcast Cablevision of Jersey City for Access to the Premises Known as Newport, Jersey City, New Jersey, Docket No. CE01090585, OAL Docket No. CTV9687091, is pending because “without knowledge of the terms and conditions that might be included in a grant of access to Comcast, RCN cannot be in a position to know the appropriate terms and conditions to include in any franchise filing it may make, particularly since the contents of any application and the statements made at any public hearing would be binding on RCN for the life of the franchise.” (Motion for Reconsideration, ¶ 8.) Accordingly, RCN requests that the Board reconsider its Order and vacate its requirements.

The Board has reviewed the submission from RCN and finds that the information raised is not sufficient to convince the Board to reconsider and vacate the requirements of the Order of April 29, 2003 under N.J.A.C. 14:1-8.6.

The Board notes that while RCN now raises the existence of a document that speaks to the easement, and that document had been entered into evidence in a current Office of Administrative Law matter, the document has not been provided to the Board. This document is purported to be an agreement between the Newport Complex owners and RCN's predecessor in interest, and provides “authority to place its cables in the easement.” Thus, the statement that “RCN has not provided any information to indicate that RCN is an owner, successor, assign, designee or nominee under the easement declaration” remains true. Nevertheless, while the Board does not have a basis to affirm or deny that RCN's predecessor in interest had the authority to place its cables within the “non-exclusive utility easement,” the right to place such wires does not impact upon the authority of RCN to operate a cable system. As such, even if the statement is taken as true, it does not require any modification of the Order on the part of the Board.

In terms of the difference between the decisions of the Eighth Circuit and the Iowa Supreme Court, and as noted by RCN, neither opinion is binding upon the Board. E.g., Pollution Control Financing Authority of Warren County v. County of Somerset, 324 N.J. Super. 391, 408 (App. Div. 1999). While RCN makes the assertion that a Circuit Court opinion is more persuasive as to federal law than an opinion by a state supreme court, this does not limit the Board in reaching a decision herein and finding the reasoning and rationale of the Iowa Supreme Court to be more persuasive than that of the Eighth Circuit. Application of Byrne, 19 N.J. Super. 319, 321 (Law Div. 1952). In the absence of binding authority, and in light of the in-depth and comprehensive review conducted by the Iowa Supreme Court, the Board reasonably based its conclusion of law on the Mason City v. City Center of Mason City, Inc. decision.

Finally, as to RCN's suggestion that the requirement to apply for municipal consent and a certificate of approval should be stayed until after the conclusion of the Comcast Access matter, the Board declines to implement this request. The interest of the Board in regulating RCN as a cable system provider is independent of the outcome of the Comcast matter, in that the Board has the duty and responsibility to regulate all cable systems providing service to customers in the State. The possible existence of a second regulated cable system in the Newport building complex does not remove the need to certify RCN consistent with the State Cable Act, N.J.S.A. 48:5A-1 et seq. Likewise, RCN, in its negotiations for municipal consent, should seek the

provisions necessary for it to supply service to the complex, subject to its rights under N.J.S.A.48:5A-17(d). Accordingly, the elements and provisions which may or may not be included in any other municipal consent do not come into consideration. Negotiations between RCN and the City of Jersey City are and shall remain between the two entities, and the provisions of any consent granted to any other party does not determine the ultimate content of RCN's municipal consent.

As such, the Board HEREBY FINDS that the information raised by RCN in its Motion for Reconsideration does not require the Board to modify its Order. Accordingly, based upon the foregoing, the Board HEREBY ORERS that the motion of RCN seeking reconsideration of the Order issued by the Board on April 29, 2003 be DENIED.

DATED: June 20, 2003

BOARD OF PUBLIC UTILITIES  
BY:

(signed)

\_\_\_\_\_  
JEANNE M. FOX  
PRESIDENT

(signed)

\_\_\_\_\_  
FREDERICK F. BUTLER  
COMMISSIONER

(signed)

\_\_\_\_\_  
CAROL J. MURPHY  
COMMISSIONER

(signed)

\_\_\_\_\_  
CONNIE O. HUGHES  
COMMISSIONER

(signed)

\_\_\_\_\_  
JACK ALTER  
COMMISSIONER

ATTEST:

(signed)

KRISTI IZZO  
SECRETARY

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